FROM DICK'S MTG W/ GOVERNOR (MAY 24, 2001) - LYLE

Legal Issues Relating to PSD in North Dakota

1. What is the "baseline concentration" in North Dakota as defined by federal statute?

42 U.S.C. § 7479 (4) defines "baseline concentration" to mean:

> with respect to a pollutant, *the ambient concentration levels* which exist at the time of the first application for a permit in an area subject to this part, *based on air quality data available* in the Environmental Protection Agency or a State air pollution control agency and *on such monitoring data as the permit applicant is required to submit.* Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

Alabama Power C. v. Costle, 636 F.2d 323, 374-76 (D.C.Cir 1980) provides:

> The increment concept incorporates the idea of a baseline from which deterioration is calculated, *by models or monitors,* to determine whether it is permissible. *Congress has defined with specificity the time and manner in which the baseline for an attainment area is to be determined.*
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> ...
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> The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to (Part C), based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. (Citing 42 U.S.C. §7479(4)). EPA has acknowledged that the literal purport of the statutory definition is that the starting point ... for determining the baseline in a particular clean air region is the existing ambient pollution level in that area at the time of the first application for a permit by a major emitting facility. Yet, in a remarkable assertion of administrative power to revise what Congress has wrought, EPA's final regulations define baseline concentration in terms of actual air quality as of August 7, 1977.
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> ...
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> Industry petitioners, the State of Texas and the District of Columbia urge that EPA's uniform baseline date be set aside and the statutory baseline date reinstated.

We agree. EPA has no authority to overrule a clear, consistent congressional directive...

The statutory definition of baseline concentration was in no sense a product of legislative inadvertence. Congress focused on how to define the baseline and fully understood the consequences of its chosen resolution. The Conference Committee explicitly acknowledged its adoption of the Senate definition of baseline, and the Senate report had explicitly rejected EPA's uniform date approach Indeed, it purposely embraced the situation EPA's counsel considers anomalous: "Under this definition (of baseline) it is possible for nonmajor emitting sources to be constructed in the area after the date of enactment without having their emissions affect the ability of major emitters to use the increment available."

This differential treatment of clean air areas, keyed to when the first major emitting facility applies for a permit, is based on a sound, practical consideration. As the Senate explained,

> (t)he purpose is to use actual air quality data to establish the baseline. Where sufficient actual data are not available, the State may require the applicant to perform whatever monitoring the State believes is necessary to provide that information. This may involve monitoring for 12 months or more to establish an annual average.

EPA asserts that its uniform date is supported by s 107(d) of the Act, 91 Stat. 687, 42 U.S.C. s 7407(d) (Supp. I 1977). Brief for Respondents at 162. Section 107(d)(1) requires each state to submit to EPA, within 120 days of enactment of the 1977 amendments, a list of those portions of the state which, on August 7, 1977, do not meet a national ambient air quality standard, and a list of both those which meet all such standards and those which, for lack of sufficient information, cannot be classified and therefore are deemed clean air areas. See Citizens to Save Spencer County v. EPA, supra note 12, 195 U.S.App.D.C. at 83, 600 F.2d at 897 (dissenting opinion). But the s 107 lists submitted so far indicate that a great many states do not have acceptable air quality data showing pollution levels as of August 7, 1977. See, e. g., 43 Fed.Reg. 8967, 8970, 8978, 8980, 8983, 8985, 8992, 8999, 9001, 9002, 9005, 9012, 9017, 9019, 9025, 9027, 9029, 9035, 9037, 9041, 9044, 9046 (Mar. 3, 1978). Thus, Congress' concern over the adequacy of existing information concerning ambient air quality has been borne out by experience.

The Administrator's recitation of the administrative and technical burdens obviated by a uniform date for the setting of the baseline simply blinks reality. A uniform date for calculating the baseline does not result in establishment of a uniform baseline. Ambient concentration levels of regulated pollutants varied considerably in different clean air areas on August 7, 1977, or any date for that

> matter, and thus baselines inevitably must differ. EPA's regulations requiring baseline concentration to be figured as of August 7, 1977, must be set aside in favor of the statutory directive to ascertain the baseline in each region as of the date of the first permit application.

No "baseline concentration" for North Dakota was or has been established "based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit." Since "[t]he increment concept incorporates the idea of a baseline from which deterioration is calculated, *by models or monitors,* to determine whether it is permissible," this failure is legally significant for North Dakota in terms of defining if, when, whether, and how a violation of increment has occurred or is occurring. This oversight was not significant when PSD was used as a tool for determining siting and BACT for new sources. It is significant when it is claimed that existing sources must retrofit because of a violation of increment. It is like issuing a speeding ticket when no speed limit was ever set as required by law.

2. What are the legal consequences of the variances that have been granted to major sources in North Dakota?

When a FLM variance is granted under 42 U.S.C. § 7475 (c)(iii) that facility may impact the Class I area up to the level allowed in 42 U.S.C. § 7475 (c)(iv) (essentially the Class II standards. See also N.D. Admin. Code § 33-15-15-01 (2)(j)(4). The legal consequences for North Dakota facilities of these granted variances as they impact increment and violations of increment need to be discussed and determined.

3. What are the legal consequences of using non-approved models, guidance that is not rule, and agreed upon methods that are neither in statute, rule, nor guidance, especially when statutory requirements such as an initial monitored baseline have been ignored?

Probably not good for either EPA or the state. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir 2000), which states in part:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency

operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L.REV. 59, 85 (1995). [FN9] The agency may also think there is another advantage--immunizing its lawmaking from judicial review.

FN9. How much more efficient than, for instance, the sixty rounds of notice and comment rulemaking preceding the final rule in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

A.

EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not "binding." [FN10] Brief of Respondent at 30. *See* GUIDANCE at 19. It is worth pausing a minute to consider what is meant by "binding" in this context. Only "legislative rules" have the force and effect of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 & n. 31, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). A "legislative rule" is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. [FN11] If this were all that "binding" meant, EPA's *1021 **52 Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. [FN12] But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. *See, e.g., McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C.Cir.1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding." *See* Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like-- Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328- 29 (1992), and cases there cited.

FN10. Our jurisdiction extends to "any ... nationally applicable ... final action taken by" the EPA "Administrator." 42 U.S.C. § 7607(b)(1). The Guidance issued over the signatures of two high level EPA officials rather than the Administrator. EPA does not, however, contest petitioners' assertion that because "the document was drafted, and reviewed by, high

ranking officials in several EPA offices, including EPA's lawyers, there is no reason to doubt the authors' authority to speak for the Agency." Brief of Petitioners at 42. *See Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1531-32 (D.C.Cir.1990); *Natural Resources Defense Council, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C.Cir.1988).

FN11. We have also used "legislative rule" to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking. *See, e.g., American Mining Congress v. Department of Labor*, 995 F.2d 1106, 1110 (D.C.Cir.1993). In this case, by "rule" we mean the following:

... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....

5 U.S.C. § 551(4).

4. What issues are "growth management decisions left to the states" ?

Alabama Power, 636 F.2d at 363-64 states in part:

Finally, industry petitioners argue that the EPA regulations that preceded passage by Congress of the PSD provisions undertook to prevent significant deterioration through preconstruction review only. And they further agree, correctly, the legislative history gives no indication that this fundamental aspect of the prior regulatory approach was being altered. But this omission and negative implications do not offset the language of the Act and the affirmative implications of the House Report that enforcement measures were contemplated beyond preconstruction review. Though the Act is patterned in many respects on the pre-existing regulatory approach, there are many differences. Congress did not in each instance compare the legislation with the reach of the prior regulations, and we cannot view as controlling its failure to do so in this instance. [36]

The challenged regulation is interpretative in nature. [FN103] It simply states the proposition that SIPs must make provision to ensure that violations of the increments of maximum allowable concentrations do not occur, and, if they have occurred, to ensure that steps will be taken to correct the violation. EPA has furnished no guidelines to the states in this regard; there is no

requirement that specified corrective measures be employed. Industry evidences a concern that when EPA does promulgate guidelines or require specific measures, certain operating facilities will be unfairly disadvantaged. Obviously, such considerations are not ripe for review at this time. We may confirm that EPA has authority to require inclusion in state plans of provision for the correction of any violation of allowable increments or maximum allowable concentrations, and may even require, in appropriate instances, the relatively severe correctives of a rollback in operations or the application of retrofit air pollution control technology. At oral argument, EPA assured the court that any such measures would be employed in a reasonable fashion on the basis of a rule of general applicability, or by some reasonable attribution of responsibility for the violation. Any regulations promulgated will be reviewed with such considerations in mind.

FN103. As an interpretative rule, the challenged regulation was exempt from the notice and comment requirements of the APA and of section 307(d) of the Clean Air Act. 5 U.S.C. s 553(b)(A) (1976); 42 U.S.C. s 7607(d) (1978). Thus there is no merit to the contention of industry that the regulation was promulgated without due procedural regularity.

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[38] The environmental groups have petitioned us to require EPA to promulgate guidelines detailing the manner in which *364 **92 States may permit consumption of the available increments. They also seek to have EPA set aside some portion of the available increments to

ensure that current development does not inadvertently cause a violation of the maximum thresholds. EPA has evidenced an intention to promulgate guidelines to help the states manage the allocation of available increments. This is an appropriate step. But this is not to say that the agency may prescribe the manner in which states will manage their allowed internal growth. In the allocation of responsibilities made by Congress, maximum limitations have been set. *These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states.*